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## STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned constitutional scholars submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

*Amici* are teachers and students of constitutional law. They are **Laurence H. Tribe**, Tyler Professor of Constitutional Law, Harvard Law School (counsel of record); **John Hart Ely**, Paradise Professor of Law, Stanford Law School; **Gerald Gunther**, William Nelson Cromwell Professor of Law, Stanford Law School; **Philip B. Kurland**, William R. Kenan, Jr. Distinguished Service Professor Emeritus, University of Chicago; and **Kathleen M. Sullivan**, Professor of Law, Stanford Law School. They submit this brief *pro se*, representing no institution, group, or association. Their sole purpose is to offer what assistance they can to this Court as it considers and decides this important case about the meaning of the Equal Protection Clause of the Fourteenth Amendment. In particular, this brief is filed to present to the Court an argument in support of the judgment below that is quite different from and more basic than the one relied upon by the Colorado Supreme Court.

## SUMMARY OF ARGUMENT

This brief argues that Colorado's Amendment 2 constitutes a *per se* violation of the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." That command is violated when a state's constitution renders some persons ineligible for "the . . . protection of the laws" from an entire category of mistreatment — here, the mistreatment of discrimination, however invidious and unwarranted. If Colorado had declared some people within its jurisdiction completely ineligible for the protection of its laws, existing or future, from some other form of mistreatment — unjustified physical assault, for example — no one would doubt that such state action would constitute a *per se* denial of the equal protection of the laws. Selectively decreeing some "person or class of persons," to use Amendment 2's language, ineligible for legal protection from mistreatment in which the wrong charged takes the form of *discrimination as such* is every bit as offensive on its face to the principle of equality before the law.

States have no affirmative duty to enact or retain special laws for each individual or group who might be victimized by discriminatory treatment — that is, by injurious treatment that reflects prejudice and is neither privileged nor rationally justified by the context in which it occurs — just as they may well have no affirmative duty to enact or retain laws directed at other forms of wrongful treatment. But it is quite another matter for a state's constitution absolutely to preclude, for a selected set of persons, even the possibility of protection under any state or local law from a whole category of harmful conduct, including some that is undeniably wrongful.

Amendment 2 does just that. It does not simply write into the state's constitution a substantive rule that a particular sphere of conduct — for example, expelling a guest from one's home on whatever basis one wishes, however "prejudiced" one's reasons for finding the guest unwelcome — is a matter for private choice that inflicts no wrong at all and accordingly may not be made the basis of any claim for legal redress by *anyone*. Far from merely isolating particular types of injurious conduct as privileged in light of the context in which they occur, Amendment 2 absolutely precludes legal recognition, by any arm or subdivision of the state, of "any . . . claim of . . . discrimination," regardless of context, and however invidious and unjustified the discrimination might be, whenever that discrimination entails harming another person on account of that person's homosexual identity.

To recognize that Amendment 2 works a *per se* violation of the Equal Protection Clause requires no benign or even neutral view of what Amendment 2 calls "homosexual . . . orientation, conduct, practices or relationships." For literally *any* characteristic — even one on the basis of which a state may properly deny benefits or impose disabilities in a wide variety of circumstances — can sometimes become the basis for deprivations that are prejudiced rather than justified, and that are not privileged by the special context in which they occur. When Amendment 2 explicitly creates, for selected persons, a unique hole in the state's fabric of existing and potential legal protections against that admitted wrong, it provides a paradigm case of what it means for a state to structure its legal system so as to "deny" to "person[s] within its jurisdiction the equal protection of the laws."



Never since the enactment of the Fourteenth Amendment has this Court confronted a measure quite like Amendment 2 — a measure that, by its express terms, flatly excludes some of a state's people from eligibility for legal protection from a category of wrongs. Whether there might be adequate justification for a state's decision to treat homosexuals, or any other group of persons, less favorably than others *in particular circumstances*, and by what standard such a state decision should be reviewed, are questions the Court need not address in this case. All the Court needs to decide in order to affirm the judgment below is that a state's constitution *by definition* denies equal protection of the laws when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.

## ARGUMENT

Amendment 2 is a rare example of a *per se* violation of the Equal Protection Clause. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Nearly all the cases explicating that command focus on two questions: First, what features of a law — such as its impact on fundamental rights or its use of suspect classifications — should trigger heightened scrutiny of differences in treatment? Second, using the appropriate level of scrutiny, which differences in treatment should be deemed unjustified and therefore discriminatory? Amendment 2, in stark contrast, involves a prior and more basic question, whose answer does not require any inquiry into the nature of the rights that Amendment 2 might be thought to restrict, or of the class it might be said to target: May a state set some persons apart by declaring that a personal characteristic that they share may not be made the basis for *any* protection pursuant to the state's laws from *any* instance of discrimination, however invidious and unwarranted?

The answer to that question must be no. To decree that some identifying feature or characteristic of a person or group may not be invoked as the basis of any claim of discrimination under any law or

regulation enacted, previously or in the future, by the state, its agencies, or its localities — when persons and groups not sharing this characteristic are not similarly handicapped — is, *by definition*, to deny the "equal protection of the laws" to persons having that characteristic. Yet this is precisely what the State of Colorado has done. Amendment 2 (Article II, Sec. 30b of the Colorado Constitution) provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or *claim of discrimination*.

No extrapolation from precedents dealing with racial or other minorities, or from precedents dealing with rights of political or legal participation, is needed to conclude that this selective preclusion of claims of discrimination violates the Equal Protection Clause. Its facial unconstitutionality flows directly from the plain meaning of the Fourteenth Amendment's text. For Amendment 2 renders a "class of persons" in Colorado completely ineligible for the protection of its laws from an entire category of mistreatment. Had Colorado explicitly declared some people within its jurisdiction completely ineligible for the protection of its laws from some other form of mistreatment — from robbery, for example, or blackmail, or any other wrongful infliction of harm — no one would doubt that such discriminatory state action would "deny [such persons] the equal protection of the laws," regardless of the rationale the state might offer to defend it. Exactly the same holds true when some "person or class of persons" is denied all access to legal protection from mistreatment in which the wrong charged takes the form of *discrimination* as such.

Because states are not constitutionally compelled to legislate against discrimination at all, and indeed usually legislate against it one step at a time, some may confuse the selective preclusion of legal



protection from discrimination in Amendment 2 with a state's quite familiar and constitutionally benign failure to remedy all forms of discrimination at once — a confusion that is unlikely with respect to selective preclusions of legal protection against wrongs like robbery or blackmail. States have no affirmative duty to enact or retain special laws for each group that might be victimized by discrimination, just as they may well have no affirmative duty to enact or retain laws directed at other forms of mistreatment. *See, e.g., DeShaney v. Winnebago County Social Servs. Dep't.*, 489 U.S. 189, 195-97 (1989). But it is quite another matter for a state absolutely to preclude, for a selected and specified set of persons, even the possibility of protection under any state or local law from an entire category of injurious conduct at least some of which is concededly wrongful rather than privileged. *Cf. id.* at 197 n.3.[1]

Of course, it seems unthinkable that a state would deny *all* its people protection against robbery or blackmail, because most people would certainly want such protection for themselves. From the selective denial to *some* persons of all protection under state or local laws against wrongs of that sort, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). So long as the state permits persons generally to seek redress for wrongs like robbery or blackmail through the enactment or enforcement of state or local laws, the Equal Protection Clause operates to guarantee that the state may not single out *particular* persons for a denial of that opportunity.

The same must be true for the wrong of discrimination. No one

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[1] This case does not involve a state's power to specify in its constitution that a particular category of acts is immune from liability under state and local law, regardless of the actor's motives or the characteristics of the person claiming injury. If a state's constitution were, for example, to include a rule of general applicability conferring upon every homeowner the right, or privilege, to use reasonable force to expel any guest who refuses repeated requests to leave, such a provision would not implicate the *per se* rule urged here, even though it would incidentally immunize some acts that might be deemed "discriminatory."

denies that "discrimination" as a category, whatever sort of prejudice it might reflect, includes genuine wrongs of the kind that Colorado, like every other state, has from time to time sought to prevent or remedy through its system of laws — its statutes, ordinances, regulations, common-law rules or other legal policies. And quite literally *any* characteristic — even one on the basis of which a state may properly deny benefits or impose disabilities in a wide variety of circumstances — can sometimes become the basis for prejudiced rather than privileged or justified deprivations. *See, e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Yet Amendment 2 on its face creates, for selected and specified persons, a unique hole in the state's fabric of existing and potential legal protections against that wrong.[2] As such, it is a pristine illustration of what it means for a state to structure its legal system so as to "deny" to "person[s] within its jurisdiction the equal protection of the laws."

As far as the State of Colorado is concerned, this denial of protection is complete, for Colorado has used its *constitution* affirmatively to disable all lawmaking and law-enforcing processes within its borders — whether involving state legislation, a local ordinance, or the adoption or enforcement of a "policy" by state executives, administrators, or judges — that might otherwise provide legal protection from discrimination based on certain identified characteristics.[3] Embedding an otherwise unconstitutional

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[2] It is false to say, as some have, that Amendment 2 merely precludes "special rights" for homosexuals. Despite its mention of "quota preferences," Amendment 2 bears no resemblance to a requirement that all laws protecting some people from a particular category of wrongful treatment must extend equally to others who are similarly wronged. Amendment 2 is not comparable, for example, to a state constitutional provision requiring that all laws protecting homosexuals from discrimination or some other harm must extend equally to heterosexuals similarly harmed on account of *their* sexual orientation. On the contrary, Amendment 2 bars claims of discrimination based on someone's homosexuality but *not* claims of discrimination, or indeed special preferences, based on someone's heterosexuality. Amendment 2 on its face thus makes homosexuals *worse off* than heterosexuals — and worse off than hot dog vendors, optometrists, left-handed people, and every other group that remains free to claim discrimination, and even to seek preferential treatment, under state law.

[3] The amendment's prohibition is not limited to *enactments* that *explicitly*



deprivation in the state's constitution does nothing to lessen its sting. Indeed, as this case shows, it may sharpen it. Inserting a ban like that of Amendment 2 in a state constitution entails not just a repeal of, or a failure to enact or to enforce, laws protecting some citizens from discrimination, but rather puts the matter (and, in a sense, the group) beyond the reach of the state's system for making and enforcing laws. The possibility that even a state constitutional bar can in theory be lifted certainly offers no answer; if lifting a bar is the only way to remedy its inconsistency with the United States Constitution, that can

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*mention* "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." On the contrary, its prohibition expressly extends to the "enact[ment]" or "enforce[ment]" of any law or "policy" — even a pre-existing common-law rule — "whereby" any of the mentioned factors is made "the *basis* of...any...*claim* of discrimination." Thus, if a law, policy, or common-law rule forbidding, for example, arbitrary job dismissal or arbitrary eviction were to be enforced by a branch, department, agency, court or subdivision of the state in a manner that treated homosexuality as an "arbitrary" basis for dismissal or eviction, that enforcement decision would be one "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships" had become "the basis of...[a] claim of discrimination," and would thus be barred by Amendment 2.

But even if Amendment 2 were authoritatively construed by the Colorado Supreme Court as limited to measures explicitly mentioning such factors as homosexual orientation, it would still violate the Equal Protection Clause. For *other* persons are not relegated to laws protecting them from invidious discrimination only as *part* of some other, more generally defined, wrong but may (at least potentially) win the protection of laws that are directed at the invidious discrimination *as such*. That homosexuals might retain potential access, despite Amendment 2, to *part* of the state's system of laws when the invidious discrimination by which they are victimized overlaps with some other distinct wrong identified by the state hardly changes the fact that Amendment 2 selectively, and thus unequally, deprives them of the "protection of the laws" of Colorado.

And even if the Colorado Supreme Court construed the amendment as limited to statutes, ordinances and regulations, it would still violate the Equal Protection Clause. For Amendment 2 would still mean that some persons would have access only to *common-law*-based legal protections from discrimination, and never to any anti-discrimination protections under the state's *positive laws*, either extant or future. This obviously constitutes a denial, to those persons, of the "*equal* protection of the *laws*," even if it falls short of denying those persons *all* legal protection.

hardly be a ground for leaving it in place.

The fact that many of the harmful acts of discrimination that Amendment 2 places beyond the reach of any remedy under state and local laws would be *private* rather than governmental does not render the state action represented by *Amendment 2 itself* any less a violation of the Equal Protection Clause. "Equal protection *of* the laws" is not limited to equal protection *from* the laws (i.e., from laws, or other official acts, that themselves discriminate in some narrow and concrete way against particular persons or categories of persons). Rather, the Equal Protection Clause requires a regime that gives all persons equal access at least to the possibility of protection under the laws of the state from the wrongs that may befall them — whether such wrongs as robbery or such wrongs as discrimination, and whether privately or officially inflicted.[4]

Rendering some persons facially ineligible for the protection of the state's laws from a certain type of wrong, as Amendment 2 does,

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[4] As to *governmental* actions disadvantaging individuals on the basis of their homosexuality without rational justification— for instance, refusals by municipalities to provide gay men or lesbians with standard police protection in response to "911" calls — Colorado courts would obviously have to recognize claims challenging such actions as discrimination unrelated to any legitimate purpose, and therefore as conflicting with the federal Equal Protection Clause. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In recognizing such federal constitutional claims, the state's courts, even if violating Amendment 2 by "adopt[ing] or enforc[ing] any . . . policy whereby homosexual . . . orientation . . . [had become] the basis of . . . [a] claim of discrimination," would simply be obeying the United States Constitution, as the Supremacy Clause plainly obliges them to do. However, Amendment 2 *would* prevent Colorado's courts, agencies, and legislative bodies from promulgating or enforcing *state* or *local* rules or policies to redress such governmental violations by providing relief *beyond* that required by the Supremacy Clause — relief based, for example, on Denver Police Dept. Reg. RR-128 ("Members [must] be of service to anyone . . . in danger . . ., regardless of race, . . ., gender, age or *sexual orientation*")(italics added). Because the victims of governmental actions discriminating on bases *other* than homosexuality are not similarly denied access to the possibility of additional *state-law* redress, Amendment 2 deprives gay, lesbian, and bisexual victims of *state and local* discrimination of equal protection, just as it deprives gay, lesbian, and bisexual victims of *private* discrimination of equal access to legal remedies, and thus to the equal protection of the laws.



is different in character from passing generally applicable laws that merely burden the practice of activities in which such persons tend to engage, or create extra (and potentially insuperable) hurdles that must be cleared prior to the enactment of categories of legislation that those persons would tend to favor. A state constitution that prohibits local rent control ordinances, for example, or even one that bars rent control legislation entirely — perhaps proclaiming that the privilege of landlords and tenants to agree upon whatever rent they wish is an aspect of their freedom of contract under the state constitution — might be said to injure tenants more than landlords, or to disadvantage renters more than owners. But such a differential disadvantage, provided it meets a test of rationality, does not work a deprivation of the equal protection of the laws. To make the situation analogous to Amendment 2, one would have to posit a state constitution that, for example, prohibits all arms of state and local government from enacting or enforcing laws whereby individuals could claim that they have suffered discrimination (that is, unjustifiably harmful differences in treatment) — whether at the hands of employers, shopkeepers, hospitals, or anyone else — by virtue of the fact that they rent, rather than own, their homes.[5]

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[5] Accordingly, Amendment 2's violation of the Equal Protection Clause cannot be overcome by the claim that it applies equally to all persons in Colorado in that it simply identifies a distinctive type of wrong — mistreatment motivated by anti-homosexual prejudice — and withdraws that type of wrong, as to *everyone* in Colorado, from the prohibitory reach of any current or future state or local anti-discrimination measure. That claim is at least as false of Amendment 2 as it would be of the anti-tenant provisions discussed above; indeed, Amendment 2 applies *only* to the "class of persons" whose "orientation, conduct, practices or relationships" makes them vulnerable to invidious discrimination based on homosexuality.

Moreover, whether "homosexual . . . orientation, conduct, practices or relationships" are regarded as immutable or instead as involving personal choice — comparable to the choice of renting a dwelling — Amendment 2 precisely parallels the hypothetical state constitutional provision barring enactment or enforcement of any measure to remedy the distinctive harm of mistreatment motivated by anti-tenant prejudice. The fact that the persons singled out for a denial of equal protection of the laws might not constitute a fixed, immutable class, all of whose members are determined in advance, is irrelevant to the argument made in this brief, and goes at most to the separate issue of whether the persons so designated constitute a suspect class warranting heightened scrutiny.

Nor is the equal protection violation diminished if the conduct that triggers the state constitution's preclusion of anti-discrimination measures is conduct that, unlike renting a home, the state might rationally condemn or even outlaw. Imagine, for instance, a state constitutional provision singling out for such preclusion those persons who have been convicted of gambling in violation of the state's laws, and who refuse to change their behavior. Even though such a provision denies protection only to persons whose conduct the state has unquestionable authority to ban, a constitutional amendment permanently stripping those persons of any ability to claim protection under the state's laws from one or more forms of wrongful treatment (as distinguished from treatment that inflicts only a harm related to the evil that the law condemns in their conduct) would deprive them of the equal protection of the laws. The state is free to proscribe gambling and to impose fines or jail sentences for such conduct, and perhaps even to make disenfranchisement part of the punishment for the offense. But it is not free to put gamblers — even those who are serving time in prison (*see, e.g., Farmer v. Brennan*, 114 S.Ct. 1970, 1976-77 (1994))— beyond the current or potential reach of all state-law protection from physical assault, discriminatory denial of needed medical treatment, or any other unjustified infliction of harm that may be motivated by the victim's status as a gambler. The hospital that decides it will deny convicted gamblers emergency care, for example, may not be placed absolutely beyond the reach of claims, pursuant to existing or future laws enacted by the state or its subdivisions, brought on the premise that such selective denial of medical treatment constitutes invidious discrimination. The hospital has every right to combat the enactment of such laws as unnecessary or unwise, and to resist claims of discrimination brought under such laws by trying to show that its denials of service were justified. But the state denies equality under the law if it decides in advance that being a gambler, even a convicted gambler, renders a person ineligible for the protection from an entire category of wrongful conduct that might otherwise be available through the state's system for making and enforcing laws.

The reason, quite simply, is that the command of equal protection extends to every person within the state's jurisdiction, regardless of what the person might have done, and certainly regardless of what the person might be inclined to do. Outlawry may



be consistent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment. *See, e.g., Green v. United States*, 356 U.S. 165, 171 (1958) ("the severe remedy of outlawry . . . was never known to the federal law"); *Communist Party v. SACB*, 367 U.S. 1, 82, 88 (1961). It is of course true that Amendment 2 does not literally declare any class of citizens to be *outlaws*; that is, it does not completely strip any set of persons of *all* legal rights, thereby placing them in all respects outside the law. But this simply means that it does not deprive its victims of *all* legal protection. It does, however, deprive them of *equal* protection, and it is this deprivation that should be deemed fatal under the Equal Protection Clause.

Implicit in this Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), was an understanding that selective preclusion of access to state law for redress from private discrimination would be inconsistent with the Fourteenth Amendment's command of equality before the law. The Court took it for granted that there were settings in which private individuals could lawfully draw distinctions even based on race, but assumed at the same time that inns and certain other private institutions had a state-law duty to serve all without discrimination. And the Court presumed that private violations of that duty would, for *all* citizens and not just for some, be "properly cognizable by the laws of the state, and [would] presumably [be] subject to redress by those laws until the contrary appears." *Id.* at 24. It was the failure of Congress to limit its enforcement legislation to situations in which the contrary *did* appear — situations in which a state had selectively precluded "resort to the laws of the state for redress," *id.* at 17 — that invalidated the congressional enactment then before the Court. Thus, although the *Civil Rights Cases* obviously did not present the Court with any measure remotely analogous to Amendment 2, the premises underlying the Court's opinion support the argument advanced in this brief that the very text and logic of the Equal Protection Clause necessarily render Amendment 2 unconstitutional.

The early history of the interpretation of the Equal Protection Clause also reinforces the conclusion that the Fourteenth Amendment must prohibit measures that selectively foreclose access to the protection of the state's laws. In the years immediately following

passage of the Fourteenth Amendment, during legislative debates regarding the reach of the Equal Protection Clause of Section 1 and of the Enforcement Clause of Section 5, there was wide agreement that, if any state were systematically to withhold the protection of its laws from any group, such selective refusal to provide legal protection would constitute a "denial" of the equal protection of the laws.[6]

Amendment 2, of course, is far more offensive to equal protection than any mere omission or refusal to protect; it embodies a deliberate commitment, embedded in the fundamental law of the State of Colorado, to make the full reach of the state's system for making and enforcing laws and regulations available only to *some* of

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[6] *See, e.g.*, Cong. Globe, 41st Cong., 2d Sess. 3611 (1870) (statement of Senator Pool) (noting that the Fourteenth Amendment's command that a state not "deny to any person . . . the equal protection of the laws" included the obligation not to "deny by acts of omission, by a failure to prevent its own citizens from depriving by force of any of their fellow citizens of these rights"); Cong. Globe, 42nd Cong., 1st Sess. 334 (1871) (statement of Representative Hoar) ("[I]t is an effectual denial by a state of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."); *id.* at App. 182 (statement of Representative Mercur) (explaining that the word "deny" as used in the Fourteenth Amendment Equal Proctection Clause "means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the state by the Constitution"); *id.* at 501 (statement of Senator Frelinghuysen) ("A state denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A state denies protection as effectively by not executing as by not making laws."); Cong. Rec., 43rd Cong., 1st Sess. 412, 414 (1874) (statement of Representative Lawrence) (noting that the Civil Rights Act of 1866, which the Fourteenth Amendment essentially constitutionalized, and the Enforcement Act and the Ku Klux Klan Act, adopted to enforce the Fourteenth Amendment, "[a]ll . . . proceed upon the idea that if a state omits or neglects to secure the enforcement of equal rights, that it 'denies' the equal protection of the laws within the meaning of the fourteenth amendment," for the word "deny" includes "an omission by any state to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A state which omits to secure rights denies them."). *See also* Letter from Justice Bradley to Judge Woods of March 12, 1871 (on file with the New Jersey Historical Society, Newark, New Jersey) ("[D]enying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. . . .").



the state's people and not to selected and specified others. The historical record, although strongly suggestive of the conclusion that such a commitment would always have been deemed incompatible with the Equal Protection Clause, contains no direct encounter with a measure quite like Amendment 2. The pages of the United States Reports likewise contain nothing that seems entirely apposite. But if the question posed by Amendment 2 does not fit neatly into any of the established areas of this Court's Equal Protection Clause jurisprudence dealing either with suspect classifications or with fundamental rights, the reason is that Amendment 2 is quite literally unprecedented: Between the adoption of the Fourteenth Amendment and the enactment of Amendment 2, this Court has never been presented with a decision by any state explicitly to deny selected persons access to the protection of its laws from a whole category of wrongful conduct. For a state to do that is to "deny to [those persons] . . . the equal protection of the laws."

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the judgment below.

Respectfully submitted,

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